

IN THE DISTRICT COURT OF APPEALS
THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

FILED IN
3rd COURT OF APPEALS
~~AUSTIN, TEXAS~~

12/31/2018 9:31:28 AM
JEFFREY D. KYLE
Clerk

NO. 03-18-00650-CV

ALEX E. JONES, INFOWARS, LLC, FREE SPEECH SYSTEMS, LLC,
AND OWEN SHROYER
APPELLANTS

v.

NEIL HESLIN
APPELLEE

ON APPEAL FROM CAUSE NUMBER D-1-GN-18-001842
53rd DISTRICT COURT, TRAVIS COUNTY, TEXAS
HON. SCOTT JENKINGS PRESIDING

APPELLEE'S REPLY IN SUPPORT OF HIS MOTION FOR SANCTIONS

InfoWars seems to misunderstand the thrust of Appellee's request for sanctions, which focuses on InfoWars' Motions to Expedite. InfoWars spends much of its time attempting to re-litigate its need for a length extension, but it largely ignores the fact that it has twice filed a Motion to Expedite with no good cause, both times requiring a rapid and unnecessary response from Appellees' counsel.

Despite twice invoking the expedited motion process under Rule 10, InfoWars makes no attempt to show "an emergency," and thus no reason to force Appellee's counsel to respond in haste. Instead, InfoWars dishonestly argues that its conduct is

warranted because Appellees' counsel "performed a notable about-face, and took the opposite position from his prior argument." (Response, p. 4). While InfoWars correctly notes that Appellees' counsel opposed InfoWars' Motion to Extend in the *Pozner* case, InfoWars then claims that Appellees' counsel "filed his *Pozner* appellees' own motion to enlarge his own brief word limit because the record was so large." (*Id.*, p. 4-5). InfoWars claims the motion was brought because "*Pozner's* counsel said they needed to 'quote extensively' from this volume of evidence." (*Id.*, p. 5). This is absolutely false. This is not the reason the *Pozner* Appellees sought an extension. The quotation mangled by InfoWars shows *the exact opposite* is true:

Appellees will need to quote extensively from this five-year history of video statements...Nonetheless, Appellees had anticipated that even with this challenge, they would be able to produce a brief within the word count limit, though not without dogged effort. However, two circumstances discussed below have aggravated the situation. (Motion for Sanctions, Ex. C).

Those two new circumstances were 1) InfoWars challenging Appellees' claims for IIED, which had never occurred in the trial court, and 2) InfoWars' improper brief which evaded the Court's denial of the word limit by abandoning arguments in favor of bullet point citations to written objections. On that basis, this Court granted an extension to the *Pozner* Appellees.

Next, InfoWars rejects the idea that its desire to file an over-length brief should have been anticipated earlier, even though it was aware of the number of objections it raised. InfoWars claims it could not have anticipated filing an over-length brief, and

it claims this is proven “by *Heslin’s* counsel own conduct in the *Pozner* case.” (Motion, p. 11). InfoWars notes that the *Pozner* Appellees only moved for an extension of length on November 19, 2018, after receiving InfoWars’ brief. InfoWars does not explain how the *Pozner* Appellees’ request created an emergency regarding InfoWars’ briefing in the *Heslin* case, but in any case, InfoWars waited another two weeks, until December 3, to file its eleventh-hour Motion to Expedite in this case.¹

Nonetheless, determined to pin the blame for its actions on Appellee, InfoWars’ counsel poses the following question:

The question thus logically arises -- if *Heslin’s* counsel in *Pozner* knew there the volume of evidence and objections should reasonably require an enlarged word count, why did he not file his own motion to enlarge there “from the start” but instead wait until he could see the InfoWars appellants’ brief? (Motion, p. 12).

The answer is that InfoWars controls the appeal, and if it decided to file a brief with a single point of error with 5,000 words, an extension would have been unnecessary. Indeed, as stated in the *Pozner* Appellees’ motion, it was always their expectation that complying with the word limit would be possible. It was only when InfoWars filed an improper brief -- thwarting this Court’s ruling on the word limit -- that Appellees needed to seek relief. Cognizant of this Court’s burden, Appellee did not seek a similar extension in this case, and he was able to complete his brief within word limits. This was primarily because unlike the *Pozner* matter, InfoWars did not

¹ InfoWars also boasts of its attempt to confer with Appellees’ counsel prior to filing the Motion. (App. Mot. p. 13-14). Yet InfoWars’ counsel sent an email a mere three hours prior to filing.

attack an entirely new cause of action never before challenged at the trial court. In any case, InfoWars' relentless focus on the Appellee shows that 1) it has no remorse for its cavalier and frivolous use of the expedited motion process, 2) that it continues to believe its Motions to Expedite were brought in good faith, and 3) that it will likely continue to file such motions in the future.

This danger is not theoretical. On October 31, 2018, Sandy Hook parent Scarlett Lewis brought a similar suit against the Appellants in Travis County District Court, and that case is nearly certain to be heading to this Court in the very near future.² Meanwhile, in the *Pozner* case, InfoWars continued to re-litigate the word limit issue even after its own brief had been filed. While Appellees were in the midst of responding to the brief, InfoWars filed yet another motion on brief length, a "Motion to Extend Deadline and to Grant Leave for Appellants to File a Substituted Brief." This motion was actually a poorly-titled Motion for Rehearing under Tex. R. App. P. 49.1. Yet styled as it was, it required a written response from the *Pozner* Appellees.

There are three goals to this Motion for Sanctions. First, Appellees hope to demonstrate to InfoWars that it cannot abuse the expedited motion process with no good cause and no basis for an emergency. Second, the Motion seeks to address the time and effort unnecessarily spent by Appellees' counsel on this matter, all of which had to be performed in haste at InfoWars' demand. Finally, Appellees hope that a sanction from this Court will help deter similar abuses by InfoWars in the future.

² See Travis County Cause No. D-1-GN-18-006623.

Finally, regarding sources of authority, Appellee's counsel acknowledges that in the haste of responding to InfoWars' Motions in a few late-evening hours on December 3rd, the pleading referred the Court to Rule 52, which applies to original proceedings. But certainly it cannot be InfoWars' argument that this Court is powerless to address bad faith abuse of the litigation process. For example, Chapter 10 of the Remedies Code, which undoubtedly applies to proceedings in this Court, authorizes sanctions for meritless and harassing pleadings, and it also requires attorneys to certify that a "pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation." Tex. Civ. Prac. & Rem. Code § 10.001. Moreover, all courts "possess inherent power to discipline an attorney's behavior." *In re Bennett*, 960 S.W.2d 35, 40 (Tex. 1997). "The power to sanction exists to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process." *Hayes v. Hayes*, 920 S.W.2d 344, 346 (Tex. App.—Texarkana 1996, writ denied). Here, the process has been abused to Appellee's detriment, and given the statements in InfoWars' response, it appears likely that similar abuses may occur in the future. For these reasons, Appellees ask the Court to enter remedial sanctions.

Respectfully submitted,

KAster LYNCH FARRAR & BALL, LLP



MARK D. BANKSTON
State Bar No. 24071066

WILLIAM R. OGDEN
State Bar No. 24073531
1010 Lamar, Suite 1600
Houston, Texas 77002
713.221.8300 Telephone
713.221.8301 Fax

CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2018 the forgoing document was served upon all counsel of record via electronic service, as follows.

Via E-Service: *fly63rc@verizon.net*

Mark C. Enoch
Glast, Phillips & Murray, P.C.
14801 Quorum Drive, Ste. 500
Dallas, Texas 75254

A handwritten signature in black ink, appearing to read 'M. Bankston', is written over a horizontal line.

MARK D. BANKSTON